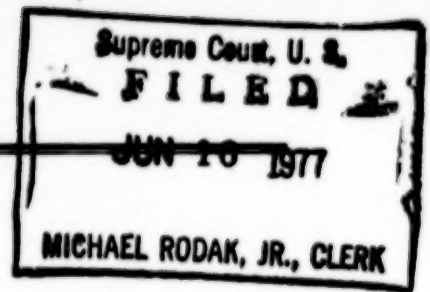


No. 76-1619



IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CRUTCHER-ROLFS-CUMMINGS, INC.

Petitioner

v.

SAM L. BALLARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CIVIL APPEALS,
THIRTEENTH JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

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To the Honorable Supreme Court of The United States:

Petitioner respectfully submits this brief in reply to arguments first raised in Respondent's Brief in Opposition.

JURISDICTION

Respondent contests the jurisdiction of this Court on the basis that the law of confidential relationship based on trade secrets is purely a question within the province of state law so that the supremacy clause of the United States Constitution has no application. However, this Court has recognized in recent years that state law dealing with unfair competition and trade secrets which tends to frustrate the purposes and objectives of federal patent law favoring publication of inventions and limited monopolies are in violation of the supremacy clause, thereby vesting jurisdiction in this Court. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969);

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225(1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). Respondent has not cited a single case post-dating these preemption cases in support of his position on jurisdiction. The conflict between Texas law and federal patent law forming the basis for jurisdiction of this Court emerged in this case when the Texas courts (1) gave trade secret protection to an invention after the invention was published in an issued United States patent; and (2) failed to apply established federal standards in determining the scope of a United States patent, admitted by Respondent to be the subject matter of the confidential relationship, in stating "The technicalities of federal patent laws are not determinative of Ballard's rights under the subject contract and confidential relationship." (Appx. A-16).

FEDERAL PATENT LAW MUST BE APPLIED IN DETERMINING THE SCOPE OF A CONFIDENTIAL RELATIONSHIP, THE SUBJECT MATTER OF WHICH IS DEFINED BY A U.S. PATENT

Respondent recognizes the critical fact that

"The only involvement of the Ballard patent in this cause was its use to define the subject matter and duration of the confidential relationship and contract."
(Respondent's Brief, p. 7)

Since the Ballard patent defined the subject matter of the confidential relationship, the state courts should have considered the federal tests for determining the proper scope of a federal patent, as well as the legislative purposes and objectives of federal patent law, to insure that Respondent's rights under his patent are dictated by federal patent law, rather than by preempted state law. The Court of Civil Appeals expressly denied that federal patent laws are relevant to the issues in this case (Appx. A-16), thereby erroneously enlarging Respondent's rights in his patent under the guise of state confidential relationship law.

Respondent cites *Saco-Lowell Shops v. Reynolds*, 141 F.2d 587(4th Cir. 1944), *Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104(7th Cir. 1936), *Smith v. Dravo Corp.*, 203 F.2d 369 (7th Cir. 1973), and *Franke v. Wilt-schek*, 209 F.2d 493(2nd Cir. 1953) in support of his position that state law on the issue of confidential relationship does not conflict with federal law. Each of these cases is easily distinguishable from the facts of this case in that (1) each case involved the breach of a confidential relationship based on trade secrets which occurred *prior* to publication of the secret, whereas in this case the alleged breach first occurred long *after* the invention was published in an issued patent; and (2) each case predates the recent decisions of this Court applying the doctrine of preemption in cases involving a conflict or potential conflict between state trade secret and unfair competition law on one hand and federal patent law on the other hand.

There is no authority whatsoever to support Respondent's position that a state may ignore federal patent law where, as Respondent himself characterizes it, a federal patent is used to define the subject matter and duration of the confidential relationship.

FRAUD

Respondent uses charges of fraud and fraudulent scheme as the foundation for the arguments set forth in his brief. There is absolutely no basis for these charges. There was no finding by the jury, trial court, or court of civil appeals that Petitioner was guilty of any fraud. The imaginary charge of fraud made by Respondent is an ill-conceived subterfuge designed to divert the Court's attention from the serious and important issues of federal preemption raised by the Petition.

CONCLUSION

Petitioner respectfully submits that the conflict between state law concerning trade secrets and federal patent law

highlighted in this case merits resolution by this Court. In this era of technology of ever increasing complexity and importance, it is imperative that those dealing in new technology do so with the certain knowledge that once a United States patent issues, then state laws of trade secrets are preempted to the extent that they are in conflict with the federal patent law and, therefore, the scope or extent of that which may be protected thereafter is governed solely by federal patent law. Otherwise, state trade secret laws make a mockery of the federal patent laws and serve no purpose other than to trap the unwary who look to the patent laws to determine their rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION has been served on plaintiff-respondent by delivering three copies to his attorney of record, Jack W. Hayden, Suite 1270 Park Tower South, 1333 West Loop South, Houston, Texas 77027, this 15th day of June, 1977.

A. H. Evans